Quah Eng Hai & Anor v Cosmopolitan Avenue Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCVC-617–11 OF 2017
MOHD FIRUZ JC
10 AUGUST 2018

Civil Procedure — Striking out — Application to strike out writ and statement of claim — Plaintiffs sued defendants premised on causes of action of conspiracy, breach of contract, negligence and breach of fiduciary duty — Defendants applied to strike out plaintiffs' writ and statement of claim — Whether claims for breach of contract, breach of fiduciary and negligence time-barred under s 6(1) of the Limitation Act 1953 — Whether plaintiffs' claim for tort of conspiracy without basis, scandalous, frivolous and vexatious — Whether plaintiffs entitled to reliefs prayed for

Limitation — Striking out action on ground of time bar — Strike out plaintiffs' claim — Plaintiffs sued defendants premised on causes of action of conspiracy, breach of contract, negligence and breach of fiduciary duty — Whether claims for breach of contract, breach of fiduciary and negligence time-barred — Limitation Act 1953 s 6(1)

Tort — Conspiracy — Allegation of — Plaintiffs purchased a lot unit office from first defendant — Plaintiffs alleged first and second defendant conspired to include unfair terms inside sale and purchase agreement ('SPA') — Whether SPA prepared by first and second defendants was for the purpose to injure plaintiffs — Whether plaintiffs' claim for tort of conspiracy without basis, scandalous, frivolous and vexatious

The plaintiffs' cause of action against the first defendant was based on the tort of conspiracy whereby the plaintiff alleged that the first and second defendants had conspired to include unfair terms inside the sale and purchase agreement ('the SPA') entered between the plaintiffs and the first defendant for the purchase of a lot unit office. The plaintiffs claimed that the said unit was a housing accommodation and not a commercial unit, as such, the provisions of the Housing Development (Control and Licensing) Act 1966 ('the HAD') should apply to the SPA. As against the first defendant's solicitors ('the second defendant'), the plaintiffs' cause of action was for breach of contract, negligence, conspiracy and breach of fiduciary. It ought to be noted that at the time where the SPA was on going, the plaintiffs had executed a certificate of election ('COE') which stipulated, inter alia, that the second defendant was

representing the vendor ie the first defendant; a copy of the SPA was shown to the plaintiffs and the contents therein were explained to the plaintiffs; the plaintiffs confirmed that they did not wish to engage their own solicitors; and the plaintiffs requested the second defendant to assist the plaintiffs to attend to the formalities of execution, adjudication, stamping and presentation of the memorandum of transfer. The plaintiffs' cause of action against the first defendant's architect ('the third defendant') was for conspiracy based on the term of the SPA which allowed the third defendant to issue certificate of completion. It was alleged that the third defendant had issued the certificate of completion for the unit purchased by the plaintiffs when the said unit was purportedly not complete. Based on the above causes of action, the plaintiffs claimed for, inter alia, a refund of the service charges, sinking fund, fire insurance premium, outgoings and interest paid by the plaintiffs for the housing loan obtained by the plaintiffs from Malayan Banking Bhd. In response to the plaintiffs' action, the defendants had filed encls 9, 12 and 14 to strike out the plaintiffs' writ and statement of claim. The arguments raised by the defendants were, inter alia, that the relief sought by the plaintiffs was untenable in law and an abused of the court process as the plaintiffs was not asking to have the SPA annulled but instead asking the court to re-write the terms of the SPA with more favorable terms in their favour; and that the plaintiffs' action was time-barred by virtue of the Limitation Act 1953 ('the Act').

Held, allowing the defendants' application with costs and striking off the plaintiffs' action:

(1) Based on the factual matrix, it was obvious that the causes of action for breach of contract as against the first and second defendants; and breach of fiduciary and negligence as against the second defendant which emanated from the SPA dated 27 November 2010 could not be sustained, due to the fact that the SPA was entered more than six years prior to the filing of the writ and statement of claim dated 9 November 2017. These causes of action which were clearly founded on contract and tort was time-barred under s 6(1) of the Act (see para 21).

(2) In so far as the SPA was concerned, the terms of the COE clearly spelt out that the second defendant was not the solicitors for the plaintiffs. Whilst the plaintiff claimed that the second defendant did not explain the terms of the COE to them, no plea of *non est factum* had been advanced. Further, the duty to explain would only arise if the second defendant was in fact the solicitors to the plaintiffs. Any allegation of misrepresentation was also caught by s 6(1) of the Act. Equally applicable would be the application of the principle of caveat emptor (see para 22).

(3) The plaintiffs' allegation that the first and second defendants never informed them that the unit was a commercial unit and that this was part

of the acts done under the conspiracy could not succeed based on the terms of the COE and the purchase application form which clearly spelt out the fact that the plaintiffs had purchased a commercial property/lot office from the first defendant. Further amplification of the court's finding that the plaintiffs' unit was part of a commercial development could be found in Pre-amble (b) and the definition of 'appropriate authority' of the SPA; and the approval for commercial development obtained by the first defendant from Majlis Bandaraya Shah Alam ('MBSA') on 17 March 2011 (see paras 24 & 26).

(4) The first defendant's project had complied with the approval of the MBSA namely that it was a commercial project. Thus, the plaintiffs' submission on the applicability of the Schedule H to HDA, the provisions of the HDA and Housing Development (Control and Licensing) Regulations 1989 and the requirement to apply for strata title, was totally misconceived. In this regard, the SPA prepared by the first and second defendants could not be said to be for purposes of injuring the plaintiff (see para 27).

(5) Under cl 20.4 of the SPA, the plaintiffs had expressly acknowledged and agreed that by reason of the unit purchased forming part of the overall development of the project, construction and other works shall continue to be carried out on, at and other parts of the project even after the issuance of the certificate of completion and compliance to the plaintiffs' unit. In light thereof, the court took the view that the plaintiffs' allegation that the property was not completed when the notice of vacant possession was issued was rather mischievous (see para 29).

(6) The provisions of cll 15, 16, 17 and 18 of the SPA expressly allowed the first defendant to bill the plaintiffs for service charges, sinking fund, fire insurance premium and outgoings. The plaintiffs' claim on this point was therefore, without substance. In respect of the interest paid by the plaintiffs for the housing loan, the first defendant's obligation to pay such interest on behalf of the plaintiff only subsisted during the construction period of the parcel. Such obligation was extinguished once the plaintiffs' parcel was completed wherein the certificate of completion was duly issued by the third defendant (see paras 30–31).

(7) Based on the above findings, the court held that there was contingent damage suffered by the plaintiff. Even if the plaintiff sought to rely on the provisions of s 29 of the Act which allowed the postponement of limitation period in cases of fraud or mistake, such reliance was never pleaded and went against the principle that parties were bound by their pleadings. On totality, the court found that the plaintiffs' claim for the tort of conspiracy against the defendants were without basis, scandalous, frivolous and vexatious (see paras 32–33).

(8) The court agreed with the second and third defendants that the plaintiffs could not come to the court to seek further and better terms of the SPA. This would amount to an abuse of court's process as the plaintiff was seeking the court's assistance to re-write the terms of the SPA. Since the plaintiffs were not satisfied with the fact that the project was approved under 'Commercial Development' and not under 'residential' or 'housing development', the plaintiffs ought to have applied for a judicial review of the development approval. There was none in this case. As such, the court concluded that the defendants had proceeded with the project in accordance with the provisions of all applicable laws related to the project (see paras 34–35).

[Bahasa Malaysia summary

Kausa tindakan plaintif terhadap defendan pertama adalah berdasarkan tort konspirasi di mana plaintif mendakwa defendan pertama dan kedua telah berkomplot untuk memasukkan terma-terma tidak adil di dalam perjanjian jual beli ('SPA') yang ditandatangani antara plaintif-plaintif dan defendan pertama bagi pembelian satu lot unit pejabat. Plaintif-plaintif mendakwa bahawa unit tersebut adalah penginapan perumahan dan bukan unit komersial, oleh itu, peruntukan Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ('APP') sepatutnya terpakai kepada SPA. Berlawanan dengan peguam defendan pertama ('defendan kedua'), kausa tindakan plaintif adalah kerana pelanggaran kontrak, kecuaian, konspirasi dan pelanggaran fidusiari. Adalah perlu diperhatikan bahawa pada masa SPA sedang berjalan, plaintif-plaintif telah melaksanakan perakuan pemilihan ('COE') yang menetapkan, antara lain, bahawa defendan kedua adalah mewakili vendor iaitu defendan pertama; satu salinan SPA telah ditunjukkan kepada plaintif-plaintif dan kandungan di dalamnya telah dijelaskan kepada plaintif-plaintif; plaintif-plaintif mengesahkan bahawa mereka tidak mahu melibatkan peguam mereka sendiri; dan plaintif-plaintif meminta defendan kedua untuk membantu plaintif-plaintif untuk menghadiri formaliti pelaksanaan, adjudikasi, pemeteraian dan pembentangan memorandum pindahmilik. Kausa tindakan plaintif-plaintif terhadap arkitek defendan pertama ('defendan ketiga') adalah untuk konspirasi berdasarkan terma SPA yang membenarkan defendan ketiga untuk mengeluarkan sijil perakuan siap. Adalah didakwa bahawa defendan ketiga telah mengeluarkan sijil perakuan siap bagi unit yang dibeli oleh plaintif-plaintif apabila unit tersebut dikatakan tidak lengkap. Berdasarkan kausa tindakan di atas, plaintif-plaintif memohon untuk, antara lain, bayaran balik caj perkhidmatan, dana terikat, insurans premium kebakaran, pengeluaran dan faedah yang dibayar oleh plaintif-plaintif untuk pinjaman perumahan yang diperoleh oleh plaintif-plaintif dari Malayan Banking Bhd. Sebagai jawapan kepada tindakan plaintif-plaintif, defendan-defendan memfailkan lampiran 9, 12 dan 14 untuk membatalkan writ dan pernyataaan tuntutan plaintif-plaintif. Hujahan yang dibangkitkan oleh defendan-defendan adalah, antara lain, bahawa relif yang diminta oleh

plaintif-plaintif adalah tidak dapat dipertahankan dari segi undang-undang dan penyalahgunaan proses mahkamah kerana plaintif-plaintif tidak meminta supaya SPA untuk dibatalkan tetapi sebaliknya meminta mahkamah untuk menulis semula terma-terma SPA dengan terma-terma yang lebih memihak kepada mereka; dan bahawa tindakan plaintif-plaintif adalah dihalang masa menurut Akta Had Masa 1953 ('Akta').

Diputuskan, membenarkan permohonan defendan-defendan dengan kos dan membatalkan tindakan plaintif-plaintif:

(1) Berdasarkan matriks faktual, adalah jelas bahawa punca-punca kausa tindakan bagi pelanggaran kontrak terhadap defendan pertama dan kedua; dan pelanggaran fidusiari dan kecuaian terhadap defendan kedua yang berpunca dari SPA bertarikh 27 November 2010 tidak dapat dikekalkan, kerana fakta bahawa SPA telah ditandatangani lebih dari enam tahun sebelum pemfailan writ dan pernyataan tuntutan bertarikh 9 November 2017. Kausa tindakan ini yang secara jelas diasakan pada kontrak dan tort adalah dihalang masa di bawah s 6(1) Akta (lihat perenggan 21).

(2) Berkenaan SPA, terma-terma COE jelas menyatakan bahawa defendan kedua bukanlah peguam bagi plaintif-plaintif. Sedangkan plaintif-plaintif mendakwa bahawa defendan kedua tidak menerangkan terma-terma COE kepada mereka, tiada pengakuan *non est factum* yang dilanjutkan. Selanjutnya, kewajipan untuk menjelaskan hanya timbul jika defendan kedua adalah peguam kepada plaintif-plaintif. Apa-apa dakwaan salah nyata juga terikat dengan s 6(1) Akta. Sama terpakai adalah penggunaaan prinsip *caveat emptor* (lihat perenggan 22).

(3) Dakwaan plaintif-plaintif bahawa defendan pertama dan kedua tidak pernah memberitahu mereka bahawa unit tersebut adalah unit komersial dan ini adalah sebahagian dari perbuatan yang dilakukan di bawah konspirasi tidak boleh berjaya berdasarkan terma-terma COE dan borang permohonan pembelian yang jelas menyatakan hakikat bahawa plaintif-plaintif telah membeli sebuah hartanah komersial/lot pejabat daripada defendan pertama. Huraian lanjut mengenai keputusan mahkamah adalah unit plaintif-plaintif adalah sebahagian daripada pembangunan komersial yang boleh didapati dalam mukadimah (b) dan maksud 'pihak berkuasa yang bersesuaian' SPA; dan kelulusan pembangunan komersial yang diperoleh oleh defendan pertama oleh Shah Alam City Council ('MBSA') pada 17 Mac 2011 (lihat perenggan 24 & 26).

(4) Projek defendan pertama telah mematuhi dengan kelulusan MBSA iaitu projek komersial. Oleh itu, hujahan plaintif-plaintif mengenai penggunaan Jadual H ke APP, peruntukan-peruntukan APP dan Peraturan-Peraturan Pemaju Perumahan (Kawalan dan Pelesenan) 1989

dan keperluan untuk memohon hakmilik strata, adalah tersalah anggap. Dalam hal ini, SPA yang disediakan oleh defendan pertama dan kedua tidak boleh dikatakan sebagai tujuan menjejaskan plaintif (lihat perenggan 27).

(5) Di bawah klausa 20.4 SPA, plaintif-plaintif telah dengan jelas mengakui dan bersetuju bahawa oleh sebab unit yang dibeli menjadi sebahagian daripada keseluruhan pembangunan projek, pembinaan dan kerja-kerja lain akan terus dijalankan di bahagian-bahagian lain projek itu walaupun selepas pengeluaran sijil perakuan siap dan pematuhan kepada unit plaintif-plaintif. Oleh itu, mahkamah berpendapat bahawa dakwaan plaintif-plaintif bahawa hartanah itu tidak siap apabila notis pemilikan kosong dikeluarkan adalah memudaratkan (lihat perenggan 29).

(6) Peruntukan klausa 15, 16, 17 dan 18 SPA jelas membenarkan defendan pertama untuk menghantar bil kepada plaintif untuk caj perkhidmatan, dana terikat, insurans premium kebakaran, dan pengeluaran. Oleh itu, tuntutan plaintif-plaintif pada ketika ini adalah tanpa asas. Berhubung dengan faedah yang dibayar oleh plaintif-plaintif bagi pinjaman perumahan, kewajipan defendan pertama untuk membayar faedah sedemikian bagi pihak plaintif hanya wujud semasa tempoh pembinaan parcel itu. Kewajipan sedemikian dihapuskan sebaik sahaja parcel plaintif-plaintif disiapkan di mana sijil perakuan siap telah dikeluarkan oleh defendan ketiga (lihat perenggan 30–31).

(7) Berdasarkan penemuan di atas, mahkamah berpendapat bahawa terdapat kerosakan kontinjen yang dialami oleh plaintif. Sekalipun plaintif berusaha untuk bergantung pada peruntukan-peruntukan s 29 Akta yang membenarkan penangguhan tempoh had masa dalam kes-kes penipuan atau kesilapan, kebergantungan itu tidak pernah dikemukakan dan menentang prinsip bahawa pihak-pihak terikat dengan permohonan mereka. Secara keseluruhannya, mahkamah mendapati bahawa tuntutan plaintif-plaintif untuk tort konspirasi terhadap defendan-defendan adalah tanpa asas, skandal, remeh dan menyusahkan (lihat perenggan 32–33).

(8) Mahkamah bersetuju dengan defendan kedua dan ketiga bahawa plaintif-plaintif tidak boleh datang ke mahkamah untuk mencari terma-terma SPA yang lebih lanjut dan lebih baik. Ini akan menjadi penyalahgunaan proses mahkamah kerana plaintif telah meminta bantuan mahkamah untuk menulis semula terma-terma SPA. Oleh kerana plaintif-plaintif tidak berpuas hati dengan hakikat bahawa projek itu telah diluluskan di bawah 'Pembangunan Komersial' dan bukan di bawah 'kediaman' atau 'pembangunan perumahan', plaintif sepatutnya memohon semakan kehakiman kelulusan pembangunan. Ianya tiada dalam kes ini. Oleh itu, mahkamah menyimpulkan bahawa defendan-defendan telah meneruskan projek itu mengikut peruntukan

semua undang-undang yang berkaitan dengan projek tersebut (lihat perenggan 34–35).]

Notes

For a case on allegation conspiracy, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 82.

For a case on strike out plaintiff's claim, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) para 2734.

For cases on application to strike out writ and statement of claim, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9357–9358.

Cases referred to

AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors [2010] 3 MLJ 784; [2010] 7 CLJ 663, CA (refd)

AmBank (M) Bhd v Kamariyah bt Hamdan & Anor [2013] 5 MLJ 448; [2013] 2 AMR 469, CA (refd)

BPI International Finance Ltd (formerly known as Ayala Finance (HK) Ltd) v Tengku Abdullah Ibni Sultan Abu Bakar [2009] 4 MLJ 821, CA (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409, SC (refd)

Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) and another appeal [2006] 1 MLJ 505, CA (refd)

Forster v Outred & Co (a firm) [1982] 2 All ER 753, CA (refd)

Law Society v Sephton & Co and others [2006] 3 All ER 401; [2006] UKHL 22, HL (refd)

Lonrho plc v Fayed and others [1991] 3 All ER 303, HL (refd)

Malaysia Land Properties Sdn Bhd (formerly known as Vintage Fame Sdn Bhd) v Tan Peng Foo [2014] 1 MLJ 718, CA (refd)

Nasri v Mesah [1971] 1 MLJ 32, FC (refd)

Ng Kian Chong & Ors v Saw Seng Kee [1994] 3 MLJ 691, HC (folld)

Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2) [1998] 1 All ER 305; [1997] 1 WLR 1627, HL (refd)

Parkson Corp Sdn Bhd v Fazaruddin bin Ibrahim (t/a Perniagaan Fatama) and another appeal [2011] 2 MLJ 46, CA (refd)

Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394, CA (refd)

SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor [2011] 4 MLJ 393, CA (refd)

Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & TBH Hong Jet [2007] 1 MLJ 163, HC (refd)

Legislation referred to

Housing Development (Control and Licensing) Act 1966
Housing Development (Control and Licensing) Regulations 1989 Schedule H
Limitation Act 1953 ss 6(1), 6(1)(a), 29
Specific Relief Act 1950 s 30

Sunil Lopez (Karen Chin with him) (Lopez & Chin) for the plaintiffs.
Ahmad Fadzly bin Abdul Gani (Azmi Fadzly Maha & Sim) for the first and third defendants.
Syed Fadzil bin Hashim Alhabshi (Aimee Lee with him) (Sidek Teoh Wong & Dennis) for the second defendant.

Mohd Firuz JC:

[1] The following is the grounds of judgment of this court in relation to the:

(a) encl 9: the first defendant's application to strike out the plaintiffs' writ and statement of claim;

(b) encl 12: the second defendant's application to strike out the plaintiffs' writ and statement of claim; and

(c) encl 14: the third defendant's application to strike out the plaintiffs' writ and statement of claim.

[2] Upon conclusion of the hearing, I had on 8 May 2018, granted order in terms for encls 9, 12 and 14 with cost of RM5,000 each payable by the plaintiffs to each of the defendant subject to allocator. The plaintiffs have since filed the notice of appeal against the above order.

BACKGROUND OF THE PLAINTIFF'S SUIT

[3] The history of this suit has been set out at length in the submission of both parties. I have adopted a large part of those factual matrix in the course of my decision.

(a) via a sale and purchase agreement dated 27 November 2010 ('the SPA'), the plaintiffs purchased a lot unit office at a development known as 'Empire City' from the first defendant;

(b) the development of Empire City was approved by the relevant government authorities on 17 March 2011;

(c) prior to the signing of the SPA, the plaintiff had on 29 October 2010 duly executed and accepted an offer known as 'the early bird offer' from the first defendant;

(d) the second defendant were the solicitors appointed by the first defendant to prepare the necessary documents for the purchase including the SPA, whilst the third defendant was the first defendant's architect for the development; and

(e) at the time where the sale and purchase transaction was on going, the plaintiffs had executed a certificate of election which stipulates as follows:

(i) the second defendants is representing the vendor (the first defendant);

(ii) the plaintiffs have been shown a copy of the SPA and the contents of the SPA been explained to the plaintiffs;

(iii) the plaintiffs have been advised and asked whether they intend to appoint their own solicitors at their own cost and confirm that they do not wish to engage their own solicitors to scrutinise the documentation including the SPA; and

(iv) the plaintiffs request that the second defendant to assist the plaintiffs to attend to the formalities of execution, adjudication, stamping and presentation of the memorandum of transfer of the property.

SUMMARY OF THE PLAINTIFF'S CLAIM

[4] The plaintiffs' cause of action against the first defendant is based on the tort of conspiracy whereby the plaintiff alleges that first and second defendant had conspired to include unfair terms inside the SPA. According to the plaintiffs, they subsequently discovered that the SPA had included unfair terms to them. In this regard, the plaintiffs are claiming that the said unit is a housing accommodation and not a commercial unit. Hence, the provisions of the Housing Development Act should apply to the SPA.

[5] The plaintiffs' cause of action against the second defendant is for breach of contract, negligence, conspiracy and breach of fiduciary duty.

[6] The plaintiffs' cause of action against the third defendant is for conspiracy based on the term in the SPA which allows the third defendant to issue the certificate of completion. The plaintiff alleges that the third defendant had issued the certificate of completion for the unit purchased by the plaintiffs when the said unit was purportedly not completed.

[7] Premised on the above causes of action, the plaintiffs in their writ and statement of claim sought for the following reliefs:

(a) a declaration that the said unit is a 'housing accommodation' as defined

in the under the Housing Development (Control and Licensing) Act 1966 ('the HDA');

(b) a declaration that the first defendant is a housing developer as defined in the HDA;

(c) a declaration that the provisions in the HDA and the rules in the Housing Development (Control and Licensing) Regulations 1989 ('the HDR') apply to the said property and that the sale and purchase transaction for the said property between the plaintiffs and the first defendant is subject to provisions in the HDA and the rules in the HDR;

(d) a declaration that cll 10, 11, 18, 21, 25, 26, 27, 29 and 33 of the sale and purchase agreement as contained in Schedule H of the HDR (pre 2015 amendment) are applicable to the sale and purchase transaction of the said property and that cll 1.1(d), 3.1, 7, 8.1, 8.3, 9.3, 18, 24, 25, 27 and 32 of the SPA are unlawful and void ab initio;

(e) a declaration that the confirmation letter issued by the third defendant is not a certificate of practical completion and is unlawful and void;

(f) a declaration that the notice of delivery of vacant possession dated 2 October 2015 issued by the first defendant is unlawful and void;

(g) a declaration that the date of delivery of vacant possession of the said property was accepted by the plaintiffs was when the plaintiffs actually took delivery of vacant possession of the said unit, ie on 5 October 2016;

(h) a declaration that the commencement date for 36 months as contained in Schedule H of the HDR (pre 2015 amendment) for completion of construction works for the said property to begin from the date of the spa, ie 27 November 2010 and the date on which the first defendant ought to have delivered vacant possession is on 26 November 2013;

(i) the first defendant, second defendant and the third defendant, jointly or severally pay to the plaintiffs liquidated ascertained damages amounting to RM135,950.05 (calculated from 27 November 2013–5 October 2016) pursuant to the terms of Schedule H or damages for loss of use and enjoyment or general damages;

(j) the first defendant, second defendant and the third defendant, jointly or severally pay to the plaintiffs liquidated ascertained damages amounting to RM28,621.06 (calculated from 27 November 2013–5 October 2016) pursuant to the terms of Schedule H or damages for loss of use and enjoyment or general damages;

(k) the first defendant, second defendant and the third defendant jointly or severally pay the plaintiffs RM460.06, ie all payments made by the plaintiffs for outgoings (as contained in cl 18 of the SPA) prior to delivery of actual vacant possession on 5 October 2016;

(l) the first defendant, second defendant and third defendant jointly or severally pay the plaintiffs RM796.15 ie all payments made by the plaintiffs for service charges and sinking fund fee (as contained in cll 15 and 16 of the SPA) prior to the delivery of actual vacant possession on 5 October 2016;

(m) the first defendant, second defendant and third defendant jointly or severally pay the plaintiffs RM126.89 ie all payments made by the plaintiffs for fire insurance premium (as contained in cl 17 of the SPA) prior to the delivery of actual vacant possession on 5 October 2016;

(n) an order that the first defendant do all that is necessary to call and hold the first annual general meeting (AGM) for the establishment of the joint management body within one month from the date of judgment;

(o) a declaration that the defect liability period for the said property commences from 5 October 2016 and continues until 5 October 2016 or until such time as this honorable court deems appropriate;

(p) the first defendant, second defendant and third defendant jointly or separately pay the plaintiffs exemplary damages;

(q) the first defendant, second defendant and third defendant jointly or severally pay the plaintiffs aggravated damages;

(r) an order that the first defendant to apply for separate strata title for the said property immediately at the first defendant's own cost;

(s) the first defendant is prohibited from changing an administrative fee for consent with regard to subsequent sale, transfer or assignment of he said property by the plaintiffs;

(t) the first defendant is prohibited from charging an administrative fee for any failure/delay by the plaintiffs to sign a memorandum of transfer for the said property;

(u) the first defendant, second defendant and third defendant jointly or separately pay the plaintiffs interest for the housing loan obtained by the plaintiffs from Malayan Banking Bhd amounting to RM21,748.23;

(v) goods and service tax ('GST') amounting to RM1,502.40 which was paid by the plaintiffs to the first defendant on the progressive billing;

(w) the first defendant, second defendant and third defendant jointly or severally pay the plaintiffs RM80 ie, payment made by the plaintiffs to the second defendant for the certificate of election ('COE');

(x) costs;

(y) interest; and

(z) any other reliefs or orders this honorable court deems fits.

SUMMARY OF THE FIRST DEFENDANTS' SUBMISSIONS TO STRIKE OUT THE PLAINTIFFS' WRIT AND STATEMENT OF CLAIM

[8] In brief the first defendant's contentions are as follows:

(a) the plaintiffs' claim is time-barred by virtue of s 6(1)(a) of the Limitation Act 1953;

(b) the cause of action of the purported conspiracy (if any) arose when the SPA was executed on 27 October 2010 as the plaintiff would have become aware of the purported unfair terms during execution of the spa (reliance placed on *Forster v Outred & Co (a firm)* [1982] 2 All ER 753 and *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784; [2010] 7 CLJ 663);

(c) the plaintiffs application for a declaration that the unit is a residential unit is misguided. The development of the Empire city project for which the plaintiffs' unit is located was approved as a commercial development by the relevant government authorities on 17 March 2011 and not by the first defendant on its own. The plaintiffs' recourse is to file a review against the government authorities and not by filing this suit against the first defendant. As it is, no suit has been filed against the government authorities related to the project; and

(d) a claim that is time-barred ought to be struck out (see *Parkson Corp Sdn Bhd v Fazaruddin bin Ibrahim (t/a Perniagaan Fatama) and another appeal* [2011] 2 MLJ 46.

SUMMARY OF THE SECOND DEFENDANTS' SUBMISSIONS TO STRIKE OUT THE PLAINTIFFS' WRIT AND STATEMENT OF CLAIM

[9] In brief, the second defendant contended as follows:

(a) the plaintiffs' claim is barred by limitation;

(b) there is no relationship — contractual or otherwise between the plaintiffs and the second defendant;

(c) the plaintiffs' claims of purported misrepresentation and fraud are nothing more than an afterthought of seven years after the signing of the SPA;

(d) the plaintiffs had at para 35 of their affidavit in reply affirmed that the SPA and COE were executed on their own will without any allegations of fraud;

(e) as the language of the COE is plain and simple, the plaintiffs ought to be estopped from denying that they were under a mistaken impression that the second defendants were purportedly their solicitors for purposes of the SPA;

(f) the plaintiffs' claim is clearly scandalous, frivolous and vexatious and ought to be struck out;

(g) the relief sought by the plaintiffs is untenable in law and an abuse of the court process as the plaintiff is not asking to have the SPA annulled but instead asking for the court to re-write the terms of the SPA with more favorable terms in their favour. In other words, the plaintiff is seeking to pick which terms of the SPA that they wish to abide by and which ought to be set aside for being unfair (reliance placed on *Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) and another appeal* [2006] 1 MLJ 505); and

(h) the plaintiffs' claim for aggravated and exemplary damages are completely without basis.

SUMMARY OF THE THIRD DEFENDANTS' SUBMISSIONS TO STRIKE OUT THE PLAINTIFF'S WRIT AND STATEMENT OF CLAIM

[10] The position taken by the third defendant is simple:

(a) they were merely acting based on their obligation to certify the completion of the development;

(b) when the plaintiffs signed the SPA, they have acknowledged the defendant's powers and obligation to issue the certify the completion (see *Malaysia Land Properties Sdn Bhd (formerly known as Vintage Fame Sdn Bhd) v Tan Peng Foo* [2014] 1 MLJ 718);

(c) the plaintiffs' cause of action (if any) is time-barred; and

(d) the reliefs sought by the plaintiffs' against the third defendant is without merit as the third defendant is not a party or privy to the SPA.

SUMMARY OF THE PLAINTIFF'S RESPONSE IN OPPOSING THE DEFENDANTS' APPLICATION FOR STRIKING OUT

[11] Briefly the plaintiff's reply in opposing the defendants application are as follows:

(i) the early bird offer was used as a bait to give the impression that the second defendant was the plaintiffs' solicitors. The signing of the early bird offer led the plaintiffs to belief that the second defendant was their lawyer and would act in the best interest of the plaintiffs wherein the plaintiffs' rights will be protected). This led to the plaintiffs being kept in

A the dark about the terms and true nature of the SPA which pave the way for the SPA and the COE to be signed without resistance;

(ii) the plaintiffs were deceived into signing the SPA as they were not aware that the second defendant only represented the first defendant;

B (iii) this belief continued until 2016, when the plaintiffs were finally told by the second defendant that the second defendant never represented the plaintiffs;

(iv) the COE signed by the plaintiffs was part of the fraudulent scheme;

C (v) on the issue of limitation, the cases relied upon by both the first and second defendants namely, *Forster v Outred*, *Ambank (M) Berhad v Abdul Aziz bin Hassan & Ors* and *DW Moore* can be distinguished as while the plaintiffs did incur contingent damage upon signing of the SPA on 27 November 2010, that contingent damage does not amount to actual D damage. As such the date of signing of the SPA cannot be taken as the date on which the cause of action for conspiracy accrued;

(vi) the signing of the SPA were part of the of a fraudulent scheme which later culminated in 2015 when the first defendant issued the notice of vacant E possession dated 2 October 2015 for the uncompleted unit;

(vii) the entire set of facts for which the plaintiffs' cause of action existed was only complete in 2015. In this regard the 'relevant period of limitation, in this case six years, runs from the date of the damage and not the date of F the act which cause the damage' reliance placed on the case of *Nasri v Mesah* [1971] 1 MLJ 32;

(viii) in a claim for the tort of conspiracy by unlawful means, the plaintiffs have to plead:

G (a) that there was an agreement or a combination between two or more individuals;

(b) there was an intention to injure;

(c) pursuant to the combination or agreement and with that intention, H certain acts were carried out; and

(d) these acts resulted in loss damage and damage to the plaintiffs.

(ix) all three defendants had conspired to carry out a fraudulent scheme with the intention of benefiting themselves and/or to the detriment of the I plaintiffs. These series of acts starting from the early bird offer finally culminated in the issuance of the notice of vacant possession even though the unit and common property was uncompleted at that date;

(x) the plaintiffs only suffered damage as at 2 October 2015 'In cases in tort the cause of action arises not when the culpable conduct occurs, but when

the Plaintiff first sustains damages' (see *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1998] 1 All ER 305; [1997] 1 WLR 1627). That being the case, limitation did not start from the date 27 November 2010 and the COE dated 29 October 2010;

Contingent damage

(xi) relying on *AmBank (M) Bhd v Kamariyah bt Hamdan & Anor* [2013] 5 MLJ 448; [2013] 2 AMR 469, the plaintiffs only suffered damage in the year 2015 as a result of the fraudulent scheme;

(xii) the decision in *Law Society v Sephton & Co and others* [2006] 3 All ER 401; [2006] UKHL 22, clearly supports the plaintiffs' proposition that the plaintiffs only sustained actual damage when the contingency is fulfilled and the loss becomes actual. As contingent damage does not amount to actual damage, the limitation period does not run from the date of the SPA on 27 October 2010;

(xiii) based on s 29 of the Limitation Act 1953, the limitation period shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence discovered it;

Applicability of the Housing Development (Control and Licensing) Act 1966 ('the HDA') and the Housing Development (Control & Licensing) Regulations ('the HDR')

(xiv) because the unit purchased by the plaintiffs conforms to the definition of 'housing accommodation' in the HDA, it was mandatory for the SPA to conform to Schedule H of the HDA. Instead the SPA contains terms which are unconscionable;

The Specific Relief Act 1950

(xv) lastly, the plaintiff relies on the provisions of s 30 of the Specific Relief Act 1950 which provides as follows:

> When through *fraud or a mutual mistake* of the parties a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, *may institute a suit to have the instrument rectified:* and if the court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the court may in its discretion rectify the

instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

THE COURT'S ANALYSIS

[12] In arriving to my decision to the defendants' application to strike out the plaintiffs' writ and statement of claim, I am guided by the following legal principles.

Principles applicable in cause of action for tort of conspiracy by unlawful means

[13] In *Lonrho plc v Fayed and others* [1991] 3 All ER 303, the House of Lords held that the tort of conspiracy can be established by showing that the intention to injure was the predominant purpose of the conspirators, where the acts to inflict damage were done by lawful means. Furthermore, it would not constitute tort of conspiracy if the acts were done by an individual.

[14] Closer to home, the elements for the tort of conspiracy was set out in the Court of Appeal case of *SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393 are as follows:

> For tort of conspiracy, there must be an unlawful object or if not in itself unlawful it must be brought about by unlawful means. There must be coexistence of an agreement with an overt act causing damage to the plaintiffs. The tort is complete if the agreement is carried into effect, thereby causing damage to the plaintiffs. In order to succeed in a claim based on the tort of conspiracy, the plaintiffs must establish (i) an agreement between two or more persons; (ii) for the purpose of injuring the plaintiff; and (iii) acts done in execution of that agreement resulted in damage to the plaintiff.

[15] In *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394 it was held that:

> 'Agreement' is not limited to a signed and sealed agreement but any informal agreement, including a combination of efforts of the alleged co-conspirators. It is trite law that the agreement to injure must come first (in order words the agreement should have crystallised), before the alleged unlawful acts are done in execution or pursuant to the agreement.

Limitation on causes of action based on breach of contract and tort

[16] Section 6(1) of the of the Limitation Act 1953 prescribes that actions founded on contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued (see *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409, *Nasri v Mesah* [1971] 1 MLJ 32 (FC) and *BPI International Finance Ltd (formerly known as Ayala*

Finance (HK) Ltd) v Tengku Abdullah Ibni Sultan Abu Bakar [2009] 4 MLJ 821).

Principles applicable in striking out application

[17] The principles applicable in a striking out application have been clearly enunciated by the Federal Court in the case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, in particular at pp 43–44 of the report, reproduced below:

> The principles upon which the Court acts in exercising its powers under any of the four limbs of O 18 r 19(1) Rules of the High Court are well settled. It is only in *plain and obvious cases* that recourse should be HDA to the summary process under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86, p 91) and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (*Attorney-General of Duchy of Lancaster v L&NW Ry Co* [1892] 3 Ch 274 (CA)). It cannot be exercised by a minute examination of the documents and the facts of the case, in order to see whether a party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871 (CA)) *The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 2* (which is in pari materia with our O 33 r 2 Rules of the High Court) (*Hubbuck v Wilkinson*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable. (Emphasis added.)

[18] I am also guided by the decision of Abdul Malik Ishak J (as he then was) in *Ng Kian Chong & Ors v Saw Seng Kee* [1994] 3 MLJ 691 (at p 698 beginning para I), wherein the learned judge explained as to what is meant by 'no reasonable cause of action', 'frivolous and vexatious' and 'an abuse of the process of the court':

> No reasonable cause of action
>
> It is said that a reasonable cause of action would mean a cause of action with some chance of success when only the allegations in the pleadings are being considered (*Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094; [1970] 1 WLR 688 (CA)). The mere fact that the cause of action is weak, and not likely to succeed, is no ground for striking it out (*Wenlock v Moloney* [1965] 2 All ER 871; [1965] 1 WLR 1238). There are several instances where the statement of claim will be struck out and the action dismissed, eg in an action of contract if it appears that there is no contract between the parties or no contract valid in law; or a totally illegal contract; or the cause of action brought solely to obtain relief from the court which has no power to grant it; and, last but by no means least, where relief is sought on a ground in which no such relief could be obtained (see *South Hetton Coal Co v Haswell, Shotton & Easington Coal and Coke Co* [1898] 1 Ch 465; *Humphrys v Polak* [1901] 2 KB 385; *Shaw v Shaw* [1965] 1 All ER 638; [1965] 1 WLR 537; *Wing v Burn* (1928) 44 TLR 258 and *Johnston v Johnston* (1884) 33 WR 239 (CA)).

Frivolous and vexatious

These words relate to cases which are obviously unsustainable as would amount to an abuse of the process of the court. The courts must in their judicial discretion determine whether the proceedings are frivolous and vexatious (see *AG of the Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274). It is now trite law that the court will not permit a plaintiff to be ousted from the judgment seat, so to speak, except where the cause of action is obviously bad and 'almost incontestably bad' (*Dyson v A-G* [1911] 1 KB 410). The pleading must, in all the circumstances, be so obviously frivolous that to advance it forward must be an abuse of the process of the court (*Young v Holloway* [1895] P 87).

Abuse of the process of the court

It is said that the process of the court must be used bona fide and properly and must not be abused. The court will always guard its machinery from being used as a means of vexation and oppression in the process of litigation (*Castro v Murray* (1875) 10 Ex 213).

[19] In the context of a striking out application, a claim viewed as *scandalous* if it is wholly unnecessary or irrelevant (see *Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & TBH Hong Jet* [2007] 1 MLJ 163).

THE COURT'S FINDINGS

[20] My review of the plaintiffs' statement of claim finds various causes of action related to this suit. These causes of action includes a claim for breach of contract as against the first and second defendant, breach of fiduciary as against the second defendant, negligence as against the second defendant and lastly, conspiracy as against all three defendants.

[21] Having examined the factual matrix of the case as pleaded by the plaintiffs, it is obvious that causes of action for breach of contract as against the first and second defendant, breach of fiduciary as against the second defendant and negligence as against the second defendant which emanates from the SPA dated 27 November 2010 cannot be sustained, due to the fact that the SPA was entered more than six years prior to the filing of the writ and statement of claim dated 9 November 2017. These causes of action which are clearly founded on contract and tort is time-barred under s 6(1) of the Limitation Act as spelled out at para [16] above.

[22] It is also my finding that, in so far as the SPA is concerned, the terms of the COE clearly spells out that the second defendant is not the solicitors for the plaintiffs. Whilst the plaintiff claimed that the second defendant did not explain the terms of the COE to them, no plea of *non est factum* has been advanced. Furthermore, the duty to explain will only arise if the second defendants were in fact the solicitors to the plaintiffs. Based on the terms of the

COE which the plaintiff signed, the first defendant were never appointed as solicitors for the plaintiff. Any allegation of misrepresentation is also caught by s 6(1) of the Limitation Act. Equally applicable would be the application of the principle of caveat emptor which the plaintiffs seems to be ignorant of.

[23] On the plaintiffs' cause of action for causing wrongful loss, it is the plaintiffs' case that limitation has not set in as this cause of action only arose upon the notice of vacant possession dated 2 October 2015 (see para [11](xi)–(xiii) above). Thus, the matter warranted further examination. At the end of the examination, I found that the claim on this heading is frivolous, vexatious and is an abuse of court process. The reasons for such conclusion will be discussed in the course of this judgment.

[24] Central to the plaintiffs' claim for the tort of causing wrongful loss is the plaintiffs' contention that the unit purchased from the first defendant is an 'accommodation' which falls under the provisions of the HDA and HDR (see para [11](xv) above). It is the plaintiff's case that they only discovered that the unit was a commercial unit and does not fall under the HDA nor HDR sometime in 2015. The plaintiffs alleged that the first and second defendants never informed them that the unit was a commercial unit and that this was part of the acts done under the conspiracy. Unfortunately for the plaintiffs, this allegation falls flat if one were to read the terms of the COE dated 29 October 2010 and the purchase application form which clearly spells out the fact that the plaintiffs had purchased a commercial property/lot office from the first defendant.

[25] Having read the provision of the SPA itself (see exh 'STWD1'), I found the following provisions to be of much importance for the determination of the defendants' applications herein:

> Pre-amble (B)
>
> The Vendor is developing the said Land into the Project (hereinafter defined) in accordance with the plans to be approved by the Appropriate Authority from time to time.
>
> Preamble (D)
>
> The Vendor shall at its own cost and expense, obtain the Building Plan (hereinafter defined) from the Appropriate Authority. A copy of the Floor Plan, Storey Plan and Site Plan in relation to the Parcel (hereinafter defined) as certified by the Vendor's architect are annexed in the FIRST SCHEDULE. The Purchaser hereby acknowledges that the Purchaser has inspected and accepted the same prior to or upon the execution of this Agreement and hereby confirms that the Vendor shall be entitled from time to time to make such amendments variations or substitution thereto as may be required by the Appropriate Authority or as determined absolutely by the Vendor and/or the Vendor's consultants or architects.

Definitions and Interpretations

(b) 'Appropriate authority' means any authority for the time being authorized under any written law in force in Malaysia to approve building plans, subdivision of land, subdivision of building; the issue of documents of title / strata title and to enforce and other laws related thereto and includes any corporation or private agency licensed by the Appropriate Authority to provide electricity, water, telephone, sewerage services, broadband, internet, telephony and data services and other related services.

(f) 'Certificate of Completion and Compliance' means the certificate of completion and compliance given or granted under the Street, Drainage and Building Act 1974 and any by laws made under that Act certifying that the Parcel has been completed and is safe and fit for occupation and where the context so permits, shall include partial certificate of completion and compliance.

(o) 'Project' means the proposed integrated commercial and/or residential development to be developed on the said Land by the Vendor known as *EMPIRE CITY @ DAMANSARA* (or such other name as may be approved by the Appropriate Authority or as may be decided by the Vendor at the Vendor's absolute discretion) comprising, inter alia, the Units, the Common Facilities, the Car Park, the Common Property, all ancillary and associated buildings or units and improvements generally in accordance with the development and/or concept plans as may be approved by the Appropriate Authority or as may be decided by the Vendor at the Vendor's absolute discretion at any time and from time to time; and where the context so permits, shall refer to the whole Project or any part thereof.

[26] Further amplification of my finding that the plaintiffs' unit is part of a commercial development can be found preamble (b) and the definition of 'appropriate authority' of the SPA as re-produced above and the approval for commercial development obtained by the first defendant from Majlis Bandaraya Shah Alam (MBSA) on 17 March 2011 (see exh 'DC3').

[27] The first defendant's project as defined at cl (O) above, complies with the approval of the MBSA namely that it is a commercial project. Thus, the plaintiffs' submission on the applicability of the Schedule H to HDA, the provisions of the HDA and HDR and the requirement to apply for strata title, is totally misconceived. In this regard, the SPA prepared by the first and second defendant cannot be said to be for purposes of injuring the plaintiff.

[28] On the issue that the first defendant had issued the notice of vacant possession without the property being completed as alleged by the plaintiffs and the act of the thirdd defendant in issuing the certificate of completion did result in damage to the plaintiffs, these acts had no connection with the second defendant. It is the both the first and third defendants case that the unit purchased by the plaintiffs has been completed. In this regard, it is my finding that the plaintiffs' definition of the 'property' which is to include both the unit

purchased by the plaintiffs and the common area is nowhere to be found in the SPA. Instead, under the SPA, the unit purchased by the plaintiffs is described as 'parcel' and that the parcel purchased is part of the project.

[29] Having taken note of the first defendant's defence that the plaintiffs parcel was indeed completed when the notice of vacant possession dated 2 October 2015 was issued and that the part which has yet to be completed at the material time is the common property, it is my finding that under cl 20.4 of the SPA, the plaintiffs had expressly acknowledges and agree that by reason of the unit purchased forming part of the overall development of the project, construction and other works shall continue to be carried out on, at and other parts of the project even after the issuance of the certificate of completion and compliance to the plaintiffs' unit. In light thereof, I take the view that the plaintiffs allegation that the property was not completed when the notice of vacant possession was issued is rather mischievous.

[30] With reference to the plaintiffs' claim for a refund of the service charges, sinking fund, fire insurance premium and outgoings, the provisions of cll 15, 16, 17 and 18 of the SPA expressly allows the first defendant to bill the plaintiffs for service charges, sinking fund, fire insurance premium and outgoings. The plaintiffs' claim on this point is therefore, without substance.

[31] With reference to the plaintiffs' claim for interest paid by the plaintiffs for the housing loan obtained by the plaintiffs from Malayan Banking Bhd, the first defendant obligation to pay the such interest on behalf of the plaintiff only subsisted during the construction period of the parcel. It is my finding that such obligation was extinguished once the plaintiffs' parcel was completed wherein the certificate of completion was duly issued by the third defendant.

[32] Based on my above findings, I am constraint to hold that there was contingent damage suffered by the plaintiff. Even if the plaintiff sought to rely on the provisions of s 29 of the Limitation Act which allows the postponement of limitation period in cases of fraud or mistake, such reliance was never pleaded and goes against the principle that parties are bound by their pleadings.

[33] Based on the above findings, I find the plaintiffs' claim for the tort of conspiracy against the first, second and third defendant without basis, scandalous, frivolous and vexatious.

WHETHER THE PLAINTIFFS ARE ENTITLED TO THE RELIEFS PRAYED FOR

[34] Towards this end, I agree with the submissions of the second and third defendants that the plaintiffs cannot come to court to seek further and better

terms of the SPA. To my mind this tantamount to an abuse of court process as the plaintiff is seeking this court's assistance to re-write the terms of the SPA (see *Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai Kg Sdn Bhd) and another appeal*).

[35] Since the plaintiffs were not satisfied with the fact that the project came was approved under 'commercial development' and not under 'residential' or 'housing development', the plaintiffs ought to have applied for a judicial review of the development approval dated 17 March 2011. There was none in this case. Hence, I can only conclude that the defendants had proceeded with the project in accordance with the provisions of all applicable laws related to the project.

CONCLUSION

[36] In the above premise, the defendants application is allowed with cost. The plaintiff's action is hereby ordered to be struck off.

Defendants' application allowed with costs; plaintiffs' action struck off.

Reported by Dzulqarnain Ab Fatar